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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-1013

LIONEL JAMES HANNA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Law Offices of
POLLACK, YOCOM & HAGGARD
1700 N.W. 7th Street
Suite 100
Miami, Florida
Counsel for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

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NO. _____

LIONEL JAMES HANNA,

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THE STATE OF FLORIDA,

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the District Court of Appeal of Florida, Fourth District, entered in the above styled case on June 20, 1972. The Petition for Rehearing was denied August 25, 1972.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Fourth District, is reported at _____ So.2d _____ and is printed at Appendix A. The opinion of the Supreme Court of Florida denying the Petition for Writ of Certiorari is reported at _____ So.2d _____ and is printed at Appendix B.

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Fourth District, was entered on June 20, 1972. The Florida Supreme Court denied Certiorari on November 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Is it a violation of a criminal defendant's Fifth Amendment Right to remain silent to allow a prosecutor during closing argument to call the jurys attention to the fact that the Defendant did not testify?

STATEMENT OF THE FACTS

The Petitioner, Lionel J. Hanna, was charged by Information with eleven (11) felonous offenses. He was arraigned on the 3rd of May, 1971 and entered a plea of not guilty to all charges. A three (3) day jury trial began on August 10, 1971. On August 12, 1971, the jury returned with a verdict of guilty as to Court IV, which was a violation of Florida Statutes 784.04. Further, the Petitioner was found guilty of a bare assault as to Count VI.

The Petitioner exercised his constitutional right to remain silent and did not testify during the jury trial. During closing argument the prosecution had the following to say:

"MR. PARKER: Dangerous weapon. Of course, there was a pistol, of course. I wasn't there, I don't know. I can't get inside L.J.'s head. I'm just as glad I can't. But I know that there was a pistol put to the side of her head and it clicked twice, you know that. You got it even from Alfonso that the word was 'Oh, I ought to kill you now.'

MR. FOLEY: Judge, I'm going to object to the prosecutor's remarks that he can't get inside L.J.'s head as being improper and —

THE COURT: Sustained. The jury is instructed to disregard that. Let's get moving.

MR. FOLEY: Judge, I think that was a comment on the defendant's failure to take the stand and move for a mistrial.

THE COURT: Denied." (R. 447)

* * *

"MR. PARKER: I feel that the State of Florida has presented an exceptional case here in this Courtroom. We have heard the testimony, I think, where is Sharon White? I told you at the beginning it would be the case of the missing victim if I were Perry Mason. All right. Where

is she? Tom Foster has been trying to locate her and indicated that other law enforcement people have. Where is she? I don't know, I don't know, I don't know where she is. But there is someone in this Courtroom who knows where she is.

MR. FOLEY: Judge, I again move for a mistrial on the basis the prosecutor is referring to somebody knows where she is and that is an indirect comment on the defendant's failure to take the stand, Judge.

THE COURT: Motion denied, but the jury is instructed to disregard the last statement by counsel." (R. 450)

In both instances the prosecution either directly or inferentially commented on the defendant's failure to testify in his own behalf. Accordingly, Motions for mistrial were made in behalf of the Petitioner. Each motion was denied by the trial court.

REASONS FOR GRANTING THE WRIT

During the closing argument in the instant case the prosecution either directly or inferentially commented upon the failure of the Petitioner to testify in his own behalf. The statements of the prosecution are quoted in the Statement of Facts. Each statement of the prosecution resulted in a motion for mistrial being tendered in behalf of the Petitioner. All motions for mistrial were denied by the trial court. It is submitted in behalf of the Petitioner that his fundamental constitutional rights as interpreted by this Court have been violated.

In **Griffin v. California**, 380 U.S. 609, 85 S. Ct. 1229 (1965) the Court determined that several remarks by a prosecutor during the course of a trial were violations of the man's constitutional rights. Amongst those remarks were:

> "The defendant certainly knows whether . . . had this beat up appearance at the time he left her apartment and went down the alley with her."
>
> * * *
>
> "What kind of man is it that would want to have sex with a woman that beat-up if she was beat-up at the time he left?"
>
> * * *
>
> ". . . is dead, she can't tell you her side of the story. The defendant won't."

The Supreme Court granted Certiorari to determine whether those above quoted statements violated the Fifth Amendment. This Court noted that "Comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice," which the Fifth Amendment prohibits. It was concluded in the Griffin Opinion that the Fifth Amendment forbids "Either comment by the prosecution on the accused's silence or instructions by the Court that such silence is evidence of guilt."

In **Malloy v. Hogan**, 378 U.S. 1, 84 S.Ct. 1489 (1964) this Court addressed itself to the question of whether the Fifth Amendment was binding upon the States' through the Fourteeth Amendment. It was there held that "The Fourteenth Amendment secures against State

invasion the same privilege that the Fifth Amendment guarantees against Federal infringment — The right of a person to remain silent unless he chooses to speak in the federed exercise of his own will, and to suffer no penalty, . . . , for such silence." In the case presented to this Court the Petitioner exercised his own federed will not to testify. The prosecution's comments certainly were a penalty imposed for the exercise of that right.

It should be noted that the State of Florida is amongst those jurisdictions that prohibit comment upon the failure of an accused to testify. See Florida Statute 918.09. The Florida cases interpreting the above mentioned statute have recognized both the statutory and constitutional protection. See **Burse v. State,** 175 So.2d 586 (Fla. App. 1965); **Flaherty v. State,** 183 So.2d 607 (Fla. App. 1966); and **Trafficante v. State,** 92 So.2d 811 (Fla. App. 1957).

In the instant case the trial court and the appellate court chose either to ignore those rights of the Petitioner or held that the comments complained of were not comments on the failure to testify. Whichever conclusion the lower courts reached it is submitted that they were erroneous. To protect this Petitioner's constitutional rights this Court should grant a Writ of Certiorari and quash the opinion below.

CONCLUSION

For the above reasons it is submitted that the Writ of Certiorari in this case should be issued and the Court should consider this case on the merits.

Respectfully submitted,

Law Office of
POLLACK, YOCOM & HAGGARD
Suite 100
1700 N. W. 7th Street
Miami, Florida

By _____
PAUL POLLACK

IN THE SUPREME COURT OF THE UNITED STATES

NO:

LIONEL JAMES HANNA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

STATE OF FLORIDA :

: SS

COUNTY OF DADE :

AFFIDAVIT OF SERVICE

I, PAUL POLLACK, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that a copy of the Petition for Writ of Certiorari to the Supreme Court of the United States was served upon the office of the HONORABLE ROBERT L. SHEVIN, Attorney General, Pan Am Building, West Palm Beach, Fla., this 11th day of June, 1973, by mailing a copy of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court.

PAUL POLLACK
Counsel for Petitioner

SWORN TO AND SUBSCRIBED TO
before me at Miami, Dade County,
Florida, this 10th day of
January, 1973

NOTARY PUBLIC, State of Florida
at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 24, 1976
BONDED THRU GENERAL INSURANCE UNDERWRITERS

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JANUARY TERM 1972

CASE NO. 71-807.

LIONEL J. HANNA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed June 20, 1972.

Appeal from the Criminal Court of Record for Palm Beach County; Joseph P. Metzger, Judge.

J. Brian Brennan of Foley and Brennan, West Palm Beach, for appellant.

Robert L. Shevin, Attorney General, Tallahassee, and Nelson E. Bailey, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We have reviewed the briefs and record on appeal and heard oral argument. On the basis thereof, we are of the opinion that no reversible error has been demonstrated. The judgment appealed from is, therefore, affirmed.

WALDEN and MAGER, JJ., and WHITE, JOSEPH S., Associate Judge, concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JULY TERM 1972

CASE NO. 71-807.

LIONEL J. HANNA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

August 25, 1972.

ORDERED that appellant's petition for rehearing, filed July 3, 1972, is hereby denied.

A TRUE COPY

EMMETT J. COMISKEY
CLERK

By: CLAIRE E. CAMPBELL
Deputy Clerk

cc: Foley and Colton
Nelson E. Bailey, Esq.

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

JULY TERM., A. D. 1972

THURSDAY, NOVEMBER 16, 1972

CASE NO. 42,830

DISTRICT COURT OF APPEAL, FOURTH DISTRICT

LIONEL J. HANNA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C.J., CARLTON, ADKINS and DEKLE, JJ., concur

ERVIN, J., dissents

A True Copy

TEST:

SID J. WHITE
Clerk Supreme Court.

by: DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida

Y

CC: Hon. E. J. Comiskey, Clerk
Hon. John B. Dunkle, Clerk
Hon. Joseph P. Metzger, Judge

Pollack & Yocom
(Hon. Paul Pollack)
Hon. Robert L. Shevin
(Hon. Reeves Bowen)
Hon. Nelson E. Bailey

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OCTOBER TERM, 1973

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LIONEL JAMES HANNA,

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VERSUS

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

ROBERT L. SHEVIN
Attorney General
STATE OF FLORIDA
Tallahassee, Florida 32304

NELSON E. BAILEY
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida
33401

Counsel for Respondent

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LIONEL JAMES HANNA,

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STATE OF FLORIDA,

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RESPONSE TO
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TO THE
DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

QUESTION PRESENTED FOR REVIEW

Whether the decision of a Florida appellate court in the instant case is violative of Petitioner Hanna's Fifth Amendment right against being compelled to testify against himself in a criminal prosecution.

STATEMENT OF THE FACTS

The State of Florida accepts Petitioner Hanna's presentation of the facts to the extent that his presentation is non-argumentative and non-conclusory; however, the State adds the following information. Prior to the prosecutor's comments at issue in this case, the defense counsel argued in his own closing argument to the jurors in the following terms,

> "Now, we have these Courts by the citizens from all over the County and you hear all the evidence and so forth, their sworn testimony. But here all you have is the State's case, . . ." (TT 417)

ARGUMENT

The precise question now before the United States Supreme Court is whether a Florida appellate court in affirming Petitioner Lionel J. Hanna's criminal conviction in state court violated the Fifth-Amendment principles set forth in Griffin v. California, 380 U.S. 609, thereby creating a substantial federal question authorizing a grant of certiorari review by the United States Supreme Court. The proper answer to that question is in the negative.

To begin with, there were certain procedural grounds warranting the state appeals court in affirming Petitioner Hanna's conviction: procedural reasons sustained by common sense about jurors and defense lawyers. It should be noted that on both occasions when the prosecutor made the objected-to remarks the defense lawyer immediately interposed his objection and stated the express grounds for his objection in the presence of the jurors. The defense counsel did not object, request the jurors be removed, and then give the grounds for his objection outside their presence. Instead, he twice objected and then commented immediately in their presence about improper reference to his own client's "failure to take the

stand." From Petitioner Hanna's point of view the two prosecutor remarks were, at best, "indirect" comments on the defendant's exercise of his Fifth Amendment right not to testify. Yet, the defense attorney's own statements in the jurors' presence were clear and direct references to, "the defendant's failure to take the stand."

The accused's lawyer moved only for a mistrial in this case -- he did not seek corrective jury instructions (though he got corrective instructions anyway). It was the State's position in the state appeals court below, and is its position before this court now, that when an accused himself emphasizes to the jurors the fact he failed to take the stand then he is without a valid basis for receiving a mistrial on grounds of the prosecutor's remarks, but is properly limited only to a corrective jury instruction. Obviously the accused has no right to augment the error and then rely upon that augmented error for an immediate mistrial.

Indeed, by failing to excuse the jurors before arguing the specific grounds for his objections the defendant failed to show good faith in tendering his objections and affirmatively demonstrated he did not consider such remarks to be incurable once heard by the jurors.

Along this same line of reasoning it is noted that during his own closing argument, prior to the prosecutor's remarks, the defense lawyer said to the jury,

> "Now, we have these Courts by the citizens from all over the County and you hear all the evidence and so forth, their sworn testimony. But here all you have got is the State's case, . . ." (TT 417)

This was just as much a comment on the accused's failure to testify as were the prosecutor's statements. So the accused himself had highlighted the fact before the prosecution ever approached the subject.

Florida case law holds that where defense counsel himself comments on an accused's failure to testify in such a way as to invite similar remarks by the prosecutor, the accused can not complain of the prosecutor's comments on appeal, cf., Waid v. State (Fla.S.Ct.1952) 58 So.2d 146; Nations v. State (2 DCA Fla.1962) 145 So.2d 259; Adjmi v. State (3 DCA Fla.1962) 139 So.2d 179, at 186-187; and Anderson v. State (2 DCA Fla.1970) 230 So.2d 704.

The State of Florida suggests the preceding facts and authorities constitute an independent procedural ground which the state appeals court properly may have used to affirm

Petitioner Hanna's conviction -- even assuming the prosecutor's remarks were violative of Mr. Hanna's Fifth Amendment rights. And this United States Supreme Court has recognized that rulings of state courts based upon independent state procedural grounds properly may reduce what otherwise would be a substantial federal question to something less than a substantial federal question, cf., Ferguson v. Georgia, 365 U.S. 570, 572. Consequently, the instant case involves something less than a substantial federal question, so issuance of the writ of certiorari is unwarranted and beyond the court's jurisdiction. See: Williams v. Georgia, 349 U.S. 375, 382-383; Michel v. Louisiana, 350 U.S. 91, 97: Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309: Bailey v. Anderson, 326 U.S. 203, 206-207.

Viewing the case from an entirely different perspective, the prosecutor's remarks should be seen as harmless error beyond a reasonable doubt. The prosecutor's comments said nothing and implied nothing to the jurors that had not been pointed out by defense counsel to the jury already. The prosecutor's comments were at best -- or at worst -- a repeat of a point already made by the defense counsel in his own closing argument. The comments were, therefore, totally harmless. Constitutional error which the

record shows to have been harmless beyond a reasonable doubt does not require automatic reversal of a criminal conviction. The Supreme Court so held in Chapman v. California, 386 U.S. 18. That principle is controlling in this case: so, again, the writ of certiorari need not issue because the cause presents no substantial federal question.

Also, the State of Florida notes that in Griffin v. California, supra, which is the decision Petitioner relies upon to document existance of a substantial federal question, the Supreme Court reversed a conviction that California reviewing courts had allowed to stand in a criminal case where at trial the prosecutor commented specifically and extensively on the accused's failure to testify, and the trial judge in his instructions commented on the same fact, instructing the jurors they could draw reasonable inferences from the accused's failure to explain or deny evidence against him. The United States Supreme Court said of the California appellate decision under review,

> "It is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is

made as in other situations; but the prosecutor's comments and the court's acquiescence are the equivalent of an offer of evidence and its acceptance.

Griffin v. California, supra, at 612.

The Supreme Court then wrote,

"For comment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v Waterfront Comm'n, 378 US 52, 55, 12 L ed 2d 678, 681, 84 S Ct 1594, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. People v Modesto, 62 Cal 2d 436, 452-453, 398 P2d 753, 762, 763. What the jury may infer, given no help from the court, is one thing. What it may infer when

> the court solemnizes the silence of the accused into evidence against him is quite another."
>
> Griffin v. California, supra, at 614.

The present case is distinguishable from Griffin v. California, supra, because in the instant case the trial court in no manner "solemnized" the accused's silence as evidence against him. If anything was done to "solemnize" his silence into evidence, it was done by the accused's lawyer himself in this case, by his once indirect and twice direct references in the jury's presence to "the defendant's failure to take the stand." There is no state action presented in this cause that raises an issue constituting a substantial federal question.

Petitioner Hanna's argument to this court is premised on an assumption that American jurors are irrevocably prejudiced against an accused once it is indirectly brought to their attention by a prosecutor that the accused has invoked his right not to testify. The Griffin decision is a case in which the trial court in some manner solemnized or endorsed such an improper inference where directly argued by the prosecutor. That did not occur here: since in this case the prosecutor's remarks were neither direct nor endorsed by

the court.

Finally, the State of Florida suggests the prosecutor's remarks, prima facie, say nothing that would prejudice the accused's right not to testify against himself, and say nothing that would unfairly prejudice the minds of the jurors against the accused.

CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General
Tallahassee, Florida
32304

By: Nelson E. Bailey
NELSON E. BAILEY
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida
33401

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District has been furnished to Honorable Paul Pollack, Attorney for Petitioner, Pollack, Yocom & Haggard, Suite 100, 1700 N.W. 7th Street, Miami, Florida, by mail this ___ day of March, 1973.

Nelson E. Bailey

NELSON E. BAILEY
Assistant Attorney General